89-2017

NO. _____

FILED
JUN 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1990

JOHN A. FARNSWORTH
Petitioner

vs.

SEA-LAND SERVICE, INC., SEA-LAND CORPORATION, AND THE UNITED STATES OF AMERICA
Defendants

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN M. GALLAGHER, JR.
1811 COLISEUM STREET
NEW ORLEANS, LA 70130
(504) 524-9669

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INTERESTED PERSONS

The following listed persons or entities have an interest in the outcome of this case.

1. Sea-Land Service, Inc.

2. The United State of America

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OPINIONS BELOW

The Fifth Circuit Court of Appeals rendered an opinion on February 8, 1990 affirming the dismissal entered by the

trial court. The opinion of the Fifth Circuit Court of Appeals was rendered without comment. (Reproduced as Appendix A-1). The Petition for a Panel Rehearing in the matter was denied, without comment, on March 8, 1990 (reproduced as Appendix A-2). These two affirmations were pursuant to the District Court's granting of a Motion to Dismiss Petitioner Farnsworth's amended complaint, which was granted on May 31, 1989 (reproduced as Appendix A-3). The District Court erroneously dismissed Mr. Farnsworth's supplemental and amended complaint, incorrectly holding that the second action was time-barred, since the original complaint was served upon the defendants sometime shortly after the 120 day time period. The Court incorrectly stated that since the

original complaint was dismissed pursuant to Rule 4(j), the amended complaint could not relate back to the date of the filing of the original complaint. The District Court reasoned that the action was time-barred. Important to note is the fact that the District Court failed to consider the fact that the amended complaint was filed and served in a timely manner long before the original complaint was dismissed by the District Court. In fact, the second complaint was filed prior to the filing of the motion to dismiss the original complaint. The defendants also consented to the filing of the second cause of action.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

Petitioner seeks a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals dated February 8, 1990, and the denial of the Petition for Rehearing by an Order dated March 8, 1990.

STATEMENT OF THE CASE

This action arises out of an adversary seaman's suit commenced by petitioner John A. Farnsworth on December 29, 1987. Mr. Farnsworth filed a seaman's suit, naming as defendants, Sea-Land Service, Inc., Sea-Land Corporation, and the United States of America. The seaman's suit was brought pursuant to the Jones Act, General Maritime Law, and the Suits in Admiralty Act. The suit alleges that Mr. Farnsworth, as a Sea-Land

Service, Inc. employee, was injured on December 30, 1985 aboard the USNS Algol. Mr. Farnsworth became permanently disabled and was forced to retire as a seaman as a result of this injury. The seaman's suit seeks, from all defendants, damages for loss of wages, loss of earning capacity, medical expenses, pain and suffering, maintenance and cure, punitive damages and attorney's fees. The defendants were furnished with a copy of the suit well prior to the Federal Rule of Civil Procedure 4(j) 120 day time limit. The defendants were given notice of the claim prior to the filing of the original complaint, as well. Service of process was effected upon the defendants, however, a short time after the expiration of the 120 day time period.

Petitioner Farnsworth instituted a second cause of action (the First Supplemental Complaint) which the defendants consented to the filing of, and which was filed into the record on February 9, 1989 and served in a timely manner on all defendants. After the institution of the second cause of action the defendant United States of America filed a motion to dismiss the original complaint, and asserted that a dismissal should be granted pursuant to Federal Rule of Civil Procedure 4(j), insofar as the first suit was not served upon the United States until after the 120 day time period. Defendant Sea-Land Services, Inc. filed a Motion for Summary Judgment, based upon other grounds, which was granted by the District Court on March 7, 1989. The District Court, also

on March 7, 1989, dismissed Mr. Farnsworth's first action (the original complaint) as being time-barred.

The United States of America then later moved to dismiss the second action (the first supplemental complaint). The Court granted this motion on March 30, 1989. The Writ of Certiorari pertains only to the last dismissal of March 30, 1989.

ARGUMENT

Mr. Farnsworth's incorrectly dismissed second cause of action for suit under the Public Vessels Act was instituted prior to the defendant's filing of its motion to dismiss the original complaint based on delay of service. The second cause of action was also filed well prior to

the dismissal of the original complaint by the District Court.

As the Fifth Circuit Court of Appeals pointed out in its decision in Caldwell v. Martin Marietta, 632 F.2d 1184 (5th Cir. 1980), Federal Rule of Civil Procedure 3 provides that a civil action commences with the filing of the complaint.

The United States Supreme Court has also ruled on this issue in West v. Conrail, 107 S.C. 1538, 95 L.Ed. 32 (1987). The Court held that the cause of action was tolled when the complaint was filed, even though service was not effected within the proper time limits, where the statute of limitations had run, and where the

District Court dismissed the suit for improper service:

"Our holding that the statute of limitations was tolled when the complaint was filed eliminates the potential difficulty in determining the actual date upon which service of the complaint was made on the various defendants." (at page 1542)

The Court specifically ruled that Federal Rule of Civil Procedure 3 supercedes Federal Rule of Civil Procedure 4(j) for purposes of tolling the statute of limitations. The Court further stated:

"The action is not barred if it has been commenced within the borrowed time period by the filing of a complaint with a court in compliance with Rule 3 of the Federal Rule of Civil Procedure."

Other Circuits have held likewise. The 8th Circuit Court of Appeals in

Moore Company v. Sid Richardson Carbon & Gas Co., 347 F.2d 921, certiorari denied, noted that Rule 3:

"Unmistakenly states in plain, clear, well understood and unambiguous language that an action is commenced by the filing of the complaint. The rule sets forth no additional requirements or conditions." (347 F.2d at 922)

The **Advisory Committee**, which drafted the Federal Rules of Civil Procedure specifically rejected suggestions that Rule 3 contain a requirement of diligent service of process. (Original Committee notes of 1937 to Rule 3 reprinted in 2 Moore's Federal Practice 3.1 [2], 1976)

The Fifth Circuit Court of Appeals, prior to its action in the instant case, previously held similarly. Shelly v.

Bayou Metals, 561 F.2d 1209 (5th Cir. 1977); Windsbrooke Developmental Corp. v. Environmental Enterprises, Inc., 524 F.2d 461 (5th Cir. 1977);

The District Court also failed to take cognizance of the fact that a second action, or an amended complaint, is not subject to a statute of limitations defense. As pointed out in 6 Wright and Miller 1474 (pp. 383-384) an amended complaint is not subject to a statute of limits defense if it does not seek an entirely new claim for relief, involving different factual allegations. As long as the second complaint arises out of the conduct, transaction, or occurrence set forth in the original complaint, the second action is not subject to a statute of limits defense or pleading. [There

is no doubt here but that both of the Farnsworth causes of action did, in fact, arise out of the same occurrence, and did not involve an entirely new claim for relief.]

Other courts have held that where a plaintiff serves a second cause of action properly (as was done in the Farnsworth case), that service of process supercedes the original filing and defective service, even in cases where the original complaint is dismissed for improper service. Ashland v. Ling 711 F.2d 1431 (9th Cir. 1983); Loux v. Rhay, 375 F.2d 55 (9th Cir. 1967); Wright and Miller also points out:

"A pleading that has been amended under Rule 15 supercedes the original pleadings. Once an amended pleading is filed, the original pleading no longer

performs any function in the case, and any subsequent motions made by an opposing party should be directed at the amended pleading." Any judgment relative to the original complaint is a nullity - 6 Wright and Miller 1476 (pp. 389-390)

Therefore, it is abundantly clear that the dismissal of the second action by the trial court was reversible error, and should have been recognized as such by the Appellate Court.

Thus, the decision of the Appellate Court is contrary to the law as annunciated by the United States Supreme Court, several appellate circuits, and is, in fact, even in conflict with prevailing pronouncements of the Fifth Circuit Court of Appeals.

CONCLUSION

For all the reasons stated above, this Court should issue a Writ of Certiorari to review the opinion of the Fifth Circuit which affirmed the District Court's dismissal of the supplemental complaint filed by your Petitioner herein, which was clearly contrary to the prevailing pronouncements of the United States Supreme Court.

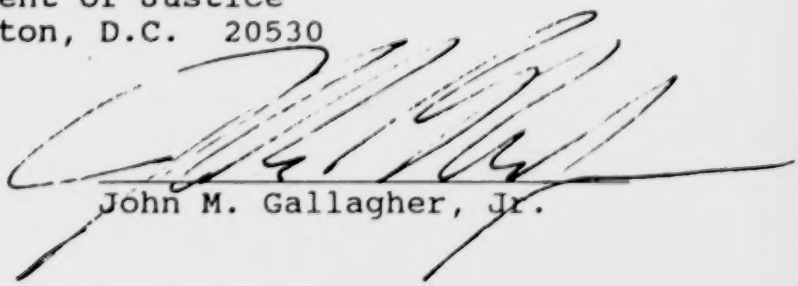


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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing briefs for the appellant have been served upon the following party in the manner indicated, on the 4th day of June, 1990.

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George B. Hall, Jr.
400 Poydras Street
New Orleans, Louisiana 70130
Attorneys for Sea-Land Services, Inc. and
The United States of America
and
The Solicitor General
Department of Justice
Washington, D.C. 20530



John M. Gallagher, Jr.

APPENDIX A-1

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 89-3307 and 89-3382

JOHN A. FARNSWORTH,

Petitioner-Appellant,

versus

SEA-LAND, INC., ET AL

Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

(CA 87-5954 H)

(February 8, 1990)

Before POLITZ, KING AND WILLIAMS, Circuit Judges

PER CURIAM:

AFFIRMED. See Local Rule 47.6

APPENDIX A-2

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NOS. 89-3307 and 89-3382

JOHN A. FARNSWORTH,

Plaintiff-Appellant,

versus

SEA-LAND SERVICE, INC., ET AL

Defendants-Appellees.

Appeals from the United States

District Court for the

Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 02/08/90, 5 Cir., 1990 ___F.2d)

(MARCH 8, 1990)

Before POLITZ, KING and WILLIAMS, Circuit Judges

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in

regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Carolyn D. King

APPENDIX A-3

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOHN A. FARNSWORTH	CIVIL ACTION
V.	NO. 87-5954
SEA-LAND SERVICE, INC.,	SECTION "H"

Order and Reasons

The motion to dismiss plaintiff's first supplemental complaint filed on behalf of defendant United States of America was considered this date on memoranda. For the following reasons, the motion is GRANTED.

The Fifth Circuit has held that "federal limitation periods are tolled from the date that a suit is filed as long as service is effected within a

reasonable time." Maxwell v. Swain, 833 F.2d 1177 (5th Cir. 1987)(emphasis added). As we have previously noted, "[i]t is clear here that service was not effected within a reasonable period of time." Order and Reasons dated April 10, 1989. Thus, the filing of the original complaint did not toll the statute of limitations. Moreover, because the original complaint was dismissed without prejudice pursuant to Rule 4(j), the amended complaint cannot relate back to the date of the filing of the original complaint. A Rule 4(j) dismissal leaves the plaintiff in the position in which he would have been had the complaint never been filed. 128 Cong.Rec. 9848 (1982) (statement of Rep. Edwards) reprinted in 1982 U.S. Code Cong. & Admin. News 4434; Johnston v. Ethyl

Corporation, 683 F.Supp. (M.D.La. 1988). Hence, there is nothing to which the amended complaint can relate back.

May 30, 1989

/S/

UNITED STATES DISTRICT COURT JUDGE

APPENDIX A-4

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOHN A. FARNSWORTH	CIVIL ACTION
VERSUS	NO. 87-5954
SEA-LAND SERVICE, INC.	SECTION "H"
SEA-LAND CORPORATION	
ABC INSURANCE COMPANY	
DEF INSURANCE COMPANY	
UNITED STATES OF AMERICA	

J U D G M E N T

Considering the court's Order and Reasons filed herein dated May 30, 1989, and further considering the court's direction as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the

defendant, United States of America, and against plaintiff, John A. Farnsworth, dismissing plaintiff's action at his cost.

New Orleans, Louisiana, this 31st day of May, 1989.

/S/

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 10 1990
JOSEPH F. SPANIOL, JR.

No. 89-2217

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN A. FARNSWORTH, PETITIONER

v.

SEA-LAND SERVICE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly dismissed petitioner's amended complaint as untimely.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-2017

JOHN A. FARNSWORTH, PETITIONER

v.

SEA-LAND SERVICE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. 16) is unreported. The opinion of the district court (Pet. 20-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1990. A petition for rehearing was denied on March 8, 1990. Pet. 17-19. The petition for a writ of certiorari was filed on June 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 29, 1987, petitioner filed an action in the United States District Court for the Eastern District of

Louisiana against the United States and his maritime employers, respondents Sea-Land Service, Inc. and Sea-Land Corporation. Petitioner claimed to have suffered injuries aboard a United States vessel on December 30, 1985, and thus sought relief under the Jones Act, the Suits in Admiralty Act, and general maritime law. Petitioner filed his suit the day before the expiration of the applicable two-year limitations period. See 46 U.S.C. 745. Petitioner, however, failed properly to serve the United States within 120 days, as required by Fed. R. Civ. P. 4(d)(4) and (j). Pet. 5, 21.

In January 1989, the United States filed a motion to dismiss petitioner's complaint without prejudice under Fed. R. Civ. P. 4(j). Petitioner responded by filing an amended complaint in February. In March, the district court granted the United States' motion and dismissed petitioner's original complaint without prejudice. Thereafter, the United States filed a motion to dismiss petitioner's amended complaint as untimely. Pet. 20-21.

2. In May 1989, the district court granted that motion and dismissed petitioner's amended complaint. Pet. 20-24. The court stated that "federal limitation periods are tolled from the date a suit is filed *as long as service is effected within a reasonable time*." Pet. 20-21 (quoting *Maxwell* v. *Swain*, 833 F.2d 1177, 1178 (5th Cir. 1987)). Since petitioner had not effected proper service of his initial complaint, the court concluded, his "filing of [that] complaint did not toll the statute of limitations." Pet. 21. Moreover, since the "Rule 4(j) dismissal [left petitioner] in the position in which he would have been had the complaint never been filed," the court held that petitioner's "amended complaint cannot relate back to the date of the filing of the original complaint." *Ibid.*

The court of appeals summarily affirmed in an unpublished judgment order. Pet. 16.

ARGUMENT

Petitioner contends (Pet. 7-13) that the district court erred in dismissing the amended complaint as untimely because the original complaint had been filed before expiration of the two-year limitations period. That contention is groundless. The district court properly dismissed petitioner's initial complaint for inadequate service under Fed. R. Civ. P. 4(j), a ruling petitioner does not dispute here. Pet. 7-8, 9. Petitioner may not avoid the consequences of that lapse, and the resulting bar of the applicable statute of limitations, by filing an amended complaint against the same defendants outside the limitations period. As the district court stated, the "Rule 4(j) dismissal [left petitioner] in the position in which he would have been had the complaint never been filed." Pet. 21.[1] Accordingly, the district court properly dismissed petitioner's amended complaint as untimely.

---

[1] Contrary to petitioner's suggestion (Pet. 11-13), the relation-back provisions of Fed. R. Civ. P. 15(c) are inapplicable here since the amended complaint neither named a new party nor added a new claim to an otherwise properly served and filed complaint. Cf. *Schiavone* v. *Fortune*, 477 U.S. 21, 29-32 (1986); *Bell* v. *Veterans Administration Hospital*, 826 F.2d 357, 360 (5th Cir. 1987).

Petitioner's reliance (Pet. 12) on *Ashland* v. *Ling-Temco-Vought, Inc.*, 711 F.2d 1431, 1436-1437 (9th Cir. 1983), is mistaken, since there the court of appeals invoked Rule 15(c) under the assumption that the original complaint had otherwise been properly served. For similar reasons, petitioner's citation (Pet. 8-9) to *West* v. *Conrail*, 481 U.S. 35 (1987), is wide of the mark. In *West*, the Court held that

> when the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been "commenced" in compliance with [Fed. R. Civ. P. 3] within the borrowed period.

481 U.S. at 39. The Court had no occasion to consider the effect of a party's failure to comply with Fed. R. Civ. P. 4(j) on an otherwise

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Assistant Attorney General
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Attorneys

AUGUST 1990

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properly "commenced" action – the circumstances at issue here – since the plaintiff in *West* had perfected service as required by Rule 4(j). See 481 U.S. at 36.

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